

Supreme Court, U.S.
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No. 89-749

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

PLAYTEX FAMILY PRODUCTS CORPORATION,

Petitioner

v.

ST. PAUL SURPLUS LINES INSURANCE CO., et al.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KANSAS

RESPONDENTS' BRIEF IN OPPOSITION

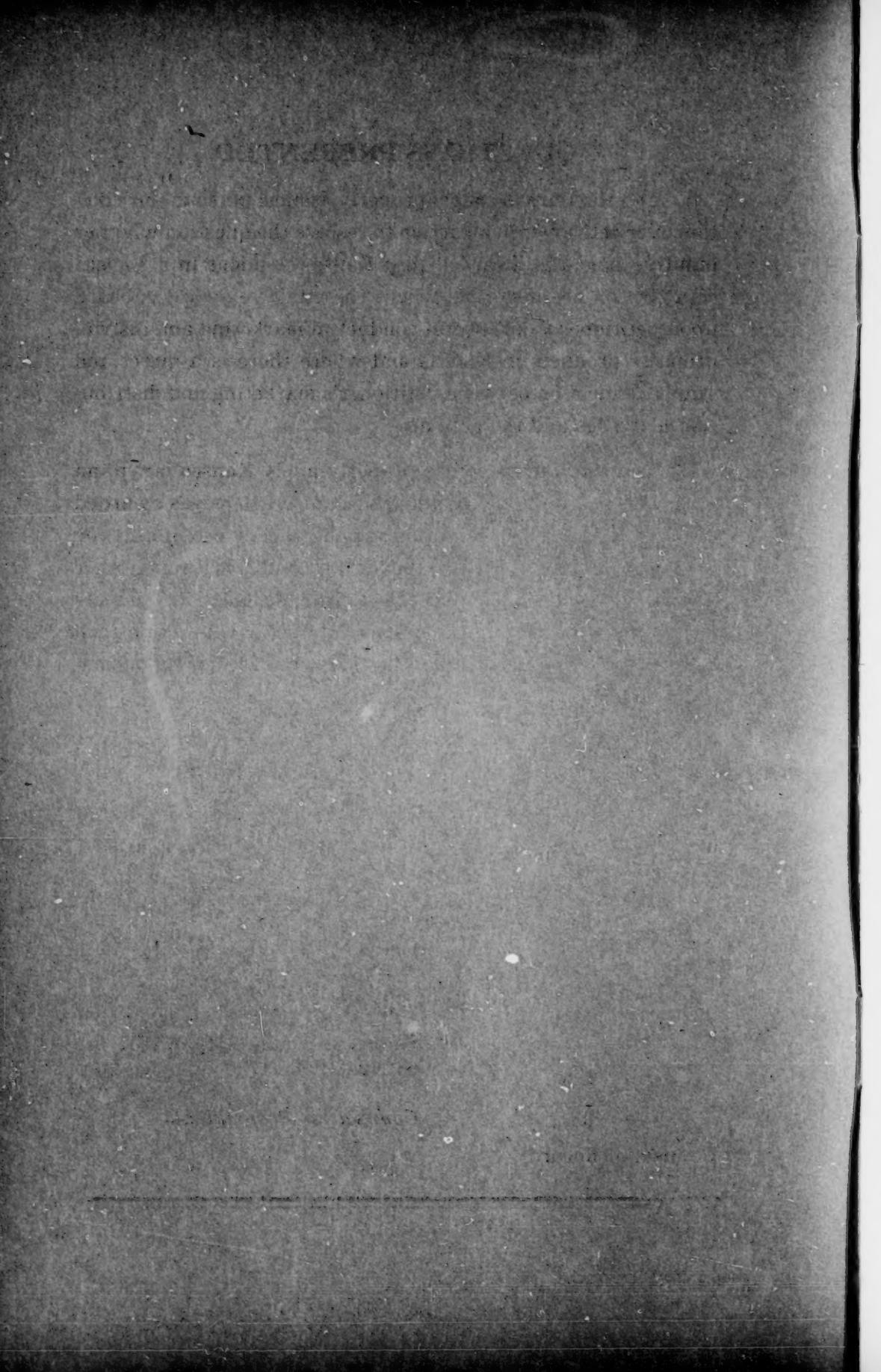
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QUESTIONS PRESENTED

- I. Did the Kansas courts properly assume personal jurisdiction over petitioner in an action to resolve the question whether punitive damages awarded to a Kansas resident in a Kansas court action are insurable where the punitive award is based upon petitioner's purposeful conduct in marketing and distributing its products in Kansas and where there is a direct and strong connection between petitioner's marketing and distribution activities and the action?
- II. Did the Kansas courts properly apply Kansas law to an action to resolve the insurability of punitive damages awarded to a Kansas resident where Kansas public policy prohibiting the insurability of such an award does not conflict with any other law that could apply and where petitioner's significant contacts with Kansas created a Kansas state interest in this action such that the choice of Kansas law is neither arbitrary nor fundamentally unfair?

**PARTIES TO THE PROCEEDING
AND RULE 28.1 STATEMENT**

Respondents, other than St. Paul Surplus Lines Insurance Co., are National Union Fire Insurance Co., International Insurance Co., Granite State Insurance Co., and AIU Insurance Co. Pursuant to Rule 28.1 of the Rules of this Court, respondents state that the parent, subsidiary, or affiliated corporations of each respondent are:

ST. PAUL SURPLUS LINES INSURANCE COMPANY

Parents: The St. Paul Companies, Inc.
St. Paul Fire and Marine Insurance Company
St. Paul Specialty Underwriting, Inc.

NATIONAL UNION FIRE INSURANCE COMPANY

Parent: American International Group, Inc.

INTERNATIONAL INSURANCE COMPANY

Parents: Xerox Corporation
Xerox Financial Services, Inc.
Crum and Forster Inc.

GRANITE STATE INSURANCE COMPANY

Parents: American International Group, Inc.
New Hampshire Insurance Co.

AIU INSURANCE COMPANY

Parent: American International Group, Inc.

Petitioner Playtex Family Products Corporation is the successor to International Playtex, Inc. and Playtex Family Products, Inc.

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**ON PETITION FOR A WRIT OF CERTIORARI
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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Kansas Supreme Court's Opinion in this case.

STATEMENT

Petitioner Piaytex Family Products Corporation (Playtex) is a producer of consumer goods which it markets and sells throughout the United States, including Kansas. During 1982 and 1983,

respondents and others¹ insured petitioner under insurance policies issued to Esmark, Inc., the parent of Playtex's predecessor corporation.² Among other things, the comprehensive multi-risk policies covered bodily injury claims arising out of products manufactured, sold, or distributed by Esmark and its subsidiaries. The policies insured risks in all fifty states and specifically recognized that coverage questions may arise under and be governed by Kansas law. In fact, the underlying policy, the terms of which were incorporated into the excess policies, contains a Personal Injury Protection Endorsement applicable only in the State of Kansas. *St. Paul Surplus Lines*, 777 P.2d at 1265.

In 1983, Betty O'Gilvie, a Kansas resident, died from Toxic Shock Syndrome (TSS) caused by her use of Playtex Super Deodorant Tampons. O'Gilvie's husband subsequently brought a claim against Playtex in the United States District Court for the District of Kansas seeking compensatory and punitive damages. A jury awarded O'Gilvie \$1,525,000 in compensatory damages and \$10,000,000 in punitive damages. Playtex appealed.

¹ Respondents provided the second and third layers of excess comprehensive general liability coverage to Esmark and its subsidiaries during the 1982-1983 policy year. The primary policy was issued by Northwestern Company. The first excess layer of coverage was provided Mission National Insurance. With limited exceptions, the excess policies incorporated the terms of the underlying policy. *St. Paul Surplus Lines, Ins. Co. v. International Playtex, Inc.*, 245 Kan. 258, 777 P.2d 1259, 1262-63 (Kan. 1989).

² During the relevant time period, Esmark was the parent company of International Playtex Incorporated, the predecessor to Playtex Family Products Corporation, petitioner in this proceeding. *St. Paul Surplus Lines*, 777 P.2d at 1262.

Upholding the jury's punitive damage award, the Tenth Circuit stated:

Punitive damages are imposed under Kansas law for "a willful and wanton invasion of the injured party's rights, the purpose being to restrain and deter others from the commission of like wrongs." . . .

[T]here is evidence that Playtex deliberately sought to profit from this situation by advertising the effectiveness of its high-absorbency tampons when it knew other manufacturers were reducing the absorbency of their products due to the evidence of a causal connection between high absorbency [sic] and toxic shock.

O'Gilvie v. International Playtex, Inc., 821 F.2d 1438, 1446 (10th Cir. 1987), cert. denied, 108 S. Ct. 2014 (1988) (citations omitted).

After Playtex's insurers had incurred liability under the policy, respondents commenced this action in Kansas state court seeking, *inter alia*, a declaration that the O'Gilvie punitive damage award was not insurable.³ On July 2, 1988, the District Court for Sedgwick County, Kansas, granted respondents' motion for partial summary judgment, ruling that it had personal jurisdiction over Playtex and that Kansas law prohibiting insurance of punitive awards applied to the dispute. *St. Paul*

³ Playtex suggests in its petition that this action represents an example of "forum shopping by preemptive strike." Petition for Writ of Certiorari at 6. However, respondents can hardly be accused of forum shopping by bringing this action in the jurisdiction in which the risk insured against actually occurred. Moreover, the Kansas State District Court expressly found in this case that

(footnote continues)

Surplus Lines Ins. Co. v. International Playtex, Inc., No. 88 C 463 (Sedgwick County, Kansas, District Court 1988) (hereinafter "Trial Court Op."), reprinted in Petition for Writ of Certiorari at 29a *et seq.* In so ruling, the Court expressly found that "this controversy arises out of injuries in Kansas suffered by a Kansas resident resulting in her wrongful death." Trial Court Op., Conclusions of Law at ¶ 2, reprinted in Petition for Writ of Certiorari at 39a. In addition, the Court found that "[i]t is a clearly expressed public policy of the State of Kansas that punitive damages for direct liability cannot be insured against," that "[p]roviding for the award of punitive damages in civil actions is a significant method by which this state protects its citizens," and that the interests of the State of Kansas "would be undermined if Kansas law were not applied to the question presented in this action." *Id.* Thus, the Kansas court held that the insurers were not obligated to pay Playtex for the punitive damage award.

(footnote continued)

[a]s of February 29, 1988, a total of 133 claims involving [toxic shock syndrome] were reported to St. Paul Surplus Lines for the policy term October 1, 1982 - October 1, 1983. These claims are the result of alleged injuries in a number of states including: California; Texas; Oregon; Florida; Oklahoma; South Carolina; North Carolina; Maryland; Iowa; Illinois; Kansas; Ohio; Louisiana; Mississippi; Missouri; Virginia; New York; West Virginia; New Jersey; Utah; Washington; Indiana; and Nebraska.

Trial Court Op. ¶ 37, reprinted in Petition for Writ of Certiorari at 36a. Thus, consistent with respondents' position, the fora and laws of the above-named states would determine the availability of payments arising out of punitive awards. In fact, respondents have denied coverage for punitive damages only for injuries in those states where public policy precludes insuring punitive damages. Trial Court Op. ¶ 39, reprinted in Petition of Writ of Certiorari at 36a.

Playtex appealed to the Kansas Supreme Court, arguing, among other things, that the trial court lacked personal jurisdiction and that the trial court improperly applied Kansas law to resolve the dispute. The Kansas Supreme Court affirmed the trial court, expressly finding:

Playtex purposefully advertised and sold its tampons in Kansas. Playtex initiated the interstate activity giving rise to the insurers' declaratory judgment claim. Playtex profited from its activity in Kansas. Playtex had fair warning that it might be subject to suit in Kansas.

St. Paul Surplus Lines, 777 P.2d at 1266 (Kan. 1989).

Based on its findings, the court concluded that Playtex's contacts with the State of Kansas supported exercise of *in personam* jurisdiction consistent with the dictates of the Due Process Clause of the United States Constitution. *Id.* at 1266. Moreover, in finding the exercise of jurisdiction appropriate, the court noted that "Kansas has a significant policy interest justifying its assertion of personal jurisdiction over Playtex." *Id.* Finally, the court held that application of Kansas law to the dispute was proper because "[w]here an award of punitive damages is made in Kansas, pursuant to the laws of Kansas, Kansas public policy should control the determination of who will pay those damages." *Id.*

After obtaining an extension of time in which to file, Playtex petitioned this Court for review of the judgment of the Supreme Court of Kansas.

REASONS FOR DENYING THE PETITION

The Kansas Supreme Court, applying the well-settled jurisdictional principles set forth by this Court, correctly upheld the trial court's exercise of personal jurisdiction over Playtex. In addition, the Kansas Supreme Court correctly applied Kansas public policy to prohibit Playtex from recovering payment for the punitive award entered against it in the State of Kansas. Far from "extreme in its view of state power," the decision of the Kansas Supreme Court merely recognizes Playtex's significant contacts with the State of Kansas in marketing and distributing a product known to cause significant injury, as well as the direct and strong connection between those marketing and distribution activities and this dispute.

I. THE KANSAS COURTS PROPERLY EXERCISED IN PERSONAM JURISDICTION OVER PLAYTEX.

In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), this Court established a framework for determining the appropriateness of asserting personal jurisdiction. Jurisdiction is appropriate if the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." *Id.* at 316. In a number of recent cases, this Court has elaborated on *International Shoe* and has set forth clear and workable principles for determining whether the exercise of personal jurisdiction over a non-resident defendant offends the Due Process Clause. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. at 462 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

Thus, once the defendant's minimum contacts with the forum have been established, the examination shifts to an evaluation of "other factors" to determine if exercise of jurisdiction comports with "fair play and substantial justice." *Burger King*, 471 U.S. at 476-77. "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Id.* In addition, as part of determining the reasonableness of jurisdiction, a court must consider the connection between a defendant's contacts in the forum and the cause of action. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977); *International Shoe*, 326 U.S. at 319.

More fundamentally, however, in examining the jurisdictional mix of contacts, nexus and fairness, this Court has refused to establish or apply a rigid rule. Rather, this Court has stated: "We . . . reject any talismanic jurisdictional formulas; 'the facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice'." *Burger King* at 485-86 (citing *Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978)).

Examination of all the relevant factors in this case reveals that the exercise of personal jurisdiction over Playtex in this action was fully consistent with the principles set forth by this Court and does not warrant review. Playtex's contacts with Kansas are purposeful, continuous and substantial. Moreover, the relationship between Playtex's substantial Kansas contacts and this cause of action is direct and strong. Finally, Kansas' exercise of personal jurisdiction over Playtex promotes fundamental fairness and substantial justice.

1. Playtex's Contacts with Kansas are Purposeful, Continuous and Systematic.

Playtex's purposeful, continuous and systematic contacts with Kansas are sufficient to support the exercise of *in personam* jurisdiction. Examining the nature of those contacts, the Kansas Supreme Court stated:

Playtex knew that its tampons were distributed in Kansas. There was a product liability risk under the insurance policies arising from the sale of Playtex tampons in Kansas.

Playtex purposefully advertised and sold its tampons in Kansas. Playtex initiated the inter-state activity giving rise to the insurer's declaratory judgment claim. Playtex profited from its activity in Kansas. Playtex had fair warning that it might be subject to suit in Kansas. In fact, Playtex has already defended itself in a lawsuit arising from these facts in Kansas.

St. Paul Surplus Lines, 777 P.2d at 1265-66. Thus, it is clear that Playtex conducted substantial activity in Kansas. This activity

strongly supports the Kansas Courts' exercise of personal jurisdiction.⁴ See *Helicopteros*, 466 U.S. at 415; *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984).

In stark contrast to the defendants in *Asahi*, and *World-Wide Volkswagen*, Playtex did not merely place its products into the stream of commerce with some vague notion that those products might wind up in Kansas. Rather, Playtex admitted manufacturing products, including Playtex deodorant tampons, which were sold and distributed throughout the United States and particularly in the State of Kansas. *St. Paul Surplus Lines Ins. Co.*, 777 P.2d at 1263. In addition, unlike the manufacturer in *Asahi*, Playtex maintains direct control over its sales and directs shipment of its products into specific states, including Kansas.⁵ Thus, unlike the defendants in *World-Wide Volkswagen* and *Asahi*, Playtex has "[p]urposely advertised and sold its tampons in Kansas." 777 P. 2d at 1266. Cf. *Burger King*, 471 U.S. at 473

⁴ The relationship between Playtex's contacts and this dispute (see infra at 10-16) and the fairness of jurisdiction in this case (see infra at 16-22) supports the exercise of jurisdiction. In addition, Playtex's substantial, systematic, and continuous contacts with the state of Kansas also meet the jurisdictional standard set forth in *Helicopteros* for the exercise of jurisdiction resulting from contacts unrelated to the cause of action. In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), cited by the Court in *Helicopteros*, the Court noted the district court's exercise of jurisdiction was supported by its findings that Hustler had engaged in a "general course of conduct in circulating magazines throughout the state"; had "purposefully directed" the magazines at the state; and that Hustler's activities "inevitably affected persons within the state." *Id.* at 774.

⁵ In its Answers to Interrogatories, which were a part of the record on appeal, Playtex stated:

All sales of tampons are communicated to Dover by the field-sales force and those orders are processed by Playtex at Dover. These orders are filled by a shipment of tampons from Dover, Delaware.

("forum legitimately may exercise personal jurisdiction over a non-resident who 'purposefully directs' his activities toward forum residents.").⁶In so doing, Playtex has sought to profit from its substantial business activities and contacts with Kansas. Playtex should not now be heard to complain that Kansas has, through the application of Kansas public policy, sought to hold Playtex accountable for its substantial wrongful conduct.

2. This Action Is Directly Related To Playtex's Activities In Kansas.

In addition to the substantial nature of Playtex's contacts with Kansas, Playtex's contacts are directly and strongly related to the present action. The sole purpose of this action is to determine whether Kansas public policy prevents insurability of punitive damages awarded to a Kansas plaintiff for a Kansas death. The connection between the forum contact and the action could not be more clear. Playtex, nevertheless, seizes upon the "nexus" element of this Court's jurisdictional analysis, suggesting that respondents' cause of action was insufficiently related to petitioner's substantial contacts with Kansas.

⁶ In light of its significant contacts with Kansas, Playtex's citations to *Hanson v. Denckla*, 357 U.S. 235 (1958), *Kulko v. Superior Court*, 436 U.S. 84, (1978), and *Rush v. Savchuk*, 444 U.S. 320 (1980) are unavailing. In those cases, this Court found that the respective states could not exercise *in personam* jurisdiction consistent with Due Process because the defendants lacked sufficient minimum contacts with the relevant fora. For example, in *Kulko*, the Court noted that the defendant had only been in the forum state on two occasions, once for three days on his way to service in Korea, and once for 24 hours on his return from the service. *Kulko*, 436 U.S. at 93. This is in stark contrast to Playtex's purposeful and continuous advertising and sales of its products in Kansas. Similarly in *Rush*, the defendant's sole connection with the forum was the presence of his insurer in the state. *Rush*, 444 U.S. at 328-29.

Playtex's contention, however, artificially limits analysis of the nexus between Playtex's Kansas contacts and this dispute by ignoring the purpose of the policies and the reality of the factual basis giving rise to the alleged obligation at issue in this case. Based on its artificially limited view, Playtex asserts an erroneous and simplistic view of this Court's jurisdictional analysis, concluding that a dichotomy exists between a "but for" test and a "substantive relevance" test and that this case represents an example of adoption of the former. Therefore, Playtex seeks review in order that the Court might "clarify" the purported discrepancy between the two incarnations of the nexus requirement.

Playtex's highly artificial and contrived approach, however, ignores this Court's repeated rejections of "any talismanic jurisdictional formulas." *Burger King*, 471 U.S. at 485-86, (citing *Kulko*, 436 U.S. at 92). Rather, as this Court has stated, "'the facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice.'" *Id.* at 486. Accordingly, in light of the fact-specific nature of the jurisdictional inquiry, adoption of one or the other of the proposed "tests" would not advance the jurisdictional inquiry in any meaningful manner. Instead, adoption of one or the other of the "tests" Playtex advances would lead inevitably to confusion as lower courts would struggle to apply a "talismanic jurisdictional formula" of a type this Court has consistently rejected.

Moreover, even if this Court were inclined to adopt one or the other of the "tests" Playtex advances, this case is an inappropriate vehicle. The result reached by the Kansas Supreme Court is correct under either a "but for" or a "substantive relevance" approach. Therefore, Playtex is inviting the Court to resolve an

issue that the case does not raise. This Court should decline the invitation. Cf. Stern, Gressman, Shapiro, *Supreme Court Practice*, §4.4 at 201-2 (6th ed. 1986) (explaining basis for denial of writ in *Sommerville v. United States*, 376 U.S. 909 (1964)).

According to Playtex, the Kansas decision "reflects a deep division" among the lower courts on issues of specific jurisdiction. Petition for Writ of Certiorari at 17. Playtex recognizes, however, that "[s]imply reviewing the lower court decisions" may not reveal the apparent conflict because "the inquiry is quite fact specific, and the courts often recite the particular case's facts without explaining the principle that guides the inquiry." Petition for Writ of Certiorari at 19. Rather than masking a "deep division," this recognition lies at the heart of this Court's jurisdictional analysis. The analysis is fact specific because, in the end, jurisdiction must comport with "fair play and substantial justice." See *Burger King*, 471 U.S. at 485-86.

Although it may be an academically interesting exercise to attempt to categorize the relationship between the cause of action and the forum contacts in any given case, such a categorization is not required under this Court's cases. Furthermore, a failure to engage in such categorization does not mean that a flaw exists in the lower courts' application of jurisdictional doctrine that must be corrected by this Court. Cf. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955) (issue on which certiorari is granted must be "beyond the academic or the episodic"). *Burger King* sets forth clear and workable principles courts must apply, recognizing that, ultimately, the lower courts are charged with doing "substantial justice." Even assuming the existence of the "deep division" Playtex purports to find in the lower courts after imposing its rigid and simplistic approach, such a division does not indicate a conflict that may be corrected merely by

adoption of one "test" or another. Rather, the differing results Playtex decries arise because the lower courts are simply applying the clear principles which this Court has established to the specific facts of each individual case.⁷

Moreover, even if the present case is analyzed under the framework petitioner suggests, the decision of the Kansas Supreme Court must be upheld. According to Playtex, the substantive relevance test provides that: "A contact counts for specific jurisdiction purposes only if the conduct of the defendant that gives rise to the contact is relevant in adjudicating the

⁷ Playtex cites three cases as examples of instances in which the courts applied a lenient "but for" test to determine whether a defendant's contacts were sufficiently related to the cause of action. Nevertheless, the cases fit into the broader jurisdictional analysis established by this Court. For example, in *Gates Learjet Corp. v. Jensen*, 743 F.2d 1235 (9th Cir. 1984), cert. denied, 471 U.S. 1066 (1985), the Ninth Circuit upheld jurisdiction by applying the following analysis:

- (1) The nonresident defendant must consummate some transaction or perform some act by which he purposely avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws.
- (2) The claim must be one which arises out of or results from the defendant's forum-related activities.
- (3) Exercise of jurisdiction must be reasonable.

743 F.2d at 1331.

After finding the necessary contacts under the first element, the Ninth Circuit determined the causes of action at issue arose out of those contacts. *Id.* at 1332. Most importantly, the *Gates* court devoted the bulk of its analysis to the third element. Through this reasonableness inquiry, the *Gates* court gave voice to this Court's requirements of fairness and substantial justice. *Id.* at 1332. Only after reviewing the reasonableness of jurisdiction did the *Gates* court determine that exercise of jurisdiction was proper.

Gates is absolutely faithful to this Court's guidance. While relatedness is one factor which must be examined, jurisdiction is determined based upon a collection of factors which ultimately require the court to determine what is reasonable. *Gates* did not, as Playtex suggests, adopt a particular nexus test.

merits of the particular dispute." Petition for Writ of Certiorari at 18. In her article, upon which Playtex relies as setting forth the "substantive relevance" test, Professor Brilmayer states the test another way: "To state that there is a related contact is to state that one of the occurrences relevant to the issues in litigation occurred in the forum." Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77, 88 (1980) (hereinafter Brilmayer).

Without directly analyzing the Kansas Court's decision in light of the substantive relevance standard, Playtex simply asserts that the relationship between its Kansas contacts and this cause of action does not rise to the level of substantive relevance. Playtex reaches this conclusion elliptically by asserting that the Kansas Supreme Court applied a "but for" test.⁸ Yet even assuming that the Kansas Supreme Court implicitly applied a "but for" test, it does not, therefore, follow that Playtex's Kansas contacts would not also pass a "substantive relevance test" to the extent such test differs from a "but for" test.

Applying the "substantive relevance test," Playtex's Kansas contacts are clearly "relevant in adjudicating the merits of [this] dispute." The alleged obligation in dispute owes its very existence to a tort action arising out of the sale of Playtex's product in Kansas which caused the death of a Kansas resident. Applying Kansas law, a Kansas jury awarded punitive damages to Betty O'Gilvie's survivors. The substantive question at issue

⁸ According to petitioner, support for this assertion is found in the Kansas Supreme Court's statement that "if it were not for the sale of Playtex products in Kansas, resulting in the death of a Kansas resident, there would be no dispute between Playtex and its insurers." Petition for Writ of Certiorari at 20.

here is whether petitioner can obtain insurance reimbursement for that punitive damage award. Thus, it is clear that "occurrences relevant to the issues in litigation occurred in the forum." *Id.*

Further evidence of the substantive relevance of Playtex's contacts with Kansas may be found in the important role those contacts played in forming the substantive (as opposed to the jurisdictional) basis of the respondents' cause of action.⁹ Even assuming respondents could have brought this action in a forum other than Kansas, the critical link between Playtex's contacts with Kansas (which included the marketing and sales of products causing the underlying injury, the tort action, and the punitive award) and the respondents' action would have required Playtex's Kansas contacts to be pled as part of the Complaint. In light of this fact, the substantive relevance of Playtex's Kansas contacts with the forum is indisputable.¹⁰

⁹ Playtex devotes several pages to arguing that Kansas law should not be applied to this dispute. Petition for Writ of Certiorari at 23-27. In so doing, however, Playtex at least tacitly recognizes that the Kansas contacts are relevant to, if not dispositive of, this dispute. Choice of law is clearly relevant to this action. Therefore, Playtex's Kansas contacts are relevant in a substantive, if not dispositive manner. In this light, to suggest that the connection between Playtex's Kansas contacts and this dispute is "too attenuated" to be relevant is to ignore the important and potentially outcome-determinative role those contacts play in the dispute.

¹⁰ In her article, Professor Brilmayer notes the value of examining a "comparable domestic complaint" in determining whether the defendant's contacts carry substantive, as opposed to merely procedural, significance. The article states:

(footnote continues)

In sum, Playtex attempts to present this Court with a highly artificial and contrived choice between two talismanic jurisdictional formulas. These formulas, while of potential academic interest, are contrary to this Court's repeated admonition to the lower courts to weigh the facts of each case to determine "whether personal jurisdiction would comport with 'fair play and substantial justice.'" In any event, this case does not present the choice of formulas Playtex proposes. Kansas jurisdiction is proper under the most stringent of the standards Playtex proposes.

3. The Kansas Court's Exercise of *In Personam* Jurisdiction Over Playtex is Consistent with Traditional Notions of Fair Play and Substantial Justice.

The Due Process limitation on the exercise of *in personam* jurisdiction serves two "related, but distinguishable, functions." *World-Wide Volkswagen*, 444 U.S. at 292. First, "[i]t protects the defendant against the burdens of litigating in a distant or inconvenient forum." *Id.* Second, it "ensure[s] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system." *Id.* In the instant case, the Kansas Court's assertion of *in personam* jurisdiction was fully consistent with both functions.

With respect to the first function, this Court has inquired whether the defendant's contacts with the forum are "such that

(footnote continued)

A contact is related to the controversy if it is the geographical qualification of a fact relevant to the merits. A forum occurrence which would ordinarily be alleged as part of a comparable domestic complaint is a related contact.

Brilmayer at 82 (footnotes omitted).

maintenance of the suit 'does not offend traditional notions of fair play and substantial justice.'" *Id.* at 292 (quoting *International Shoe*, 326 U.S. at 316 (1945)). Applying the standard, "a forum legitimately may exercise personal jurisdiction over a non-resident who 'purposefully directs' his activities toward forum residents." *Burger King Corp.*, 471 U.S. at 473. As this Court has recognized, requiring purposeful contacts ensures that the defendant will not be haled into court on the basis of "random," "fortuitous," or "attenuated" contacts. *Id.* at 475. Moreover, such deliberate activity in the forum indicates that the defendant "manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws, it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well."¹¹ *Id.* at 476.

Here, there can be no doubt that Playtex purposefully directed its activities at Kansas residents. As the Kansas Supreme Court stated, "Playtex purposefully advertised and sold its tampons in Kansas." In addition, Playtex does not here nor did it ever challenge the jurisdiction of the Kansas Courts over the underlying tort claim which resulted in the judgment

¹¹ In its Petition, Playtex contends that the underlying tort action does not evidence its contacts with Kansas because the presence of the litigation was the result of the unilateral decision of the plaintiff to commence the action in Kansas. Petition for Writ of Certiorari at 13 n.5. This contention is erroneous in a number of respects. First, the very fact that the plaintiff obtained jurisdiction over Playtex in Kansas and that Playtex did not object to such jurisdiction evidences Playtex's substantial contacts with the State of Kansas. Second, although the decision to commence the action may have been unilateral, the genesis of the action was that Playtex acted consciously and purposefully in advertising and selling defective products in Kansas. Finally, the entry of the judgment giving rise to Playtex's claim of coverage occurred in Kansas.

which forms the basis of this dispute. To the contrary, Playtex stipulated in the tort action to the Kansas court's *in personam* jurisdiction over it. Moreover, despite Playtex's attempt to minimize the nexus between the insurance policy at issue and the forum, it is indisputable that the alleged obligation on which Playtex seeks to recover is based on the punitive damage award entered in the State of Kansas as a result of Playtex's culpable conduct in marketing and selling its products in Kansas.

In addition, the existence of an insurance contract covering risks in Kansas is relevant to the fairness analysis on another level. The simple fact that Playtex chose to insure risks in Kansas indicates that Playtex expected to defend suits in Kansas. Indeed, this Court has identified procurement of insurance as one of the steps a corporation might take if its contacts are such as to provide it with "clear notice that it is subject to suit" in the forum.¹² *Asahi*, 480 U.S. at 110 (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

Playtex has structured its conduct so as to be certain that its products in Kansas would be covered by insurance. The insurance contracts at issue were not, as Playtex contends, pure indemnification agreements. Under the contracts, the insurers were obligated to pay directly "ultimate net loss" covered under the policies. That "ultimate net loss" could be payable in any

¹² Playtex contends that no jurisdictional significance should be given to the facts that the relevant insurance contracts covered risks in Kansas and contained endorsements required by Kansas law in light of the nationwide coverage provided in the contract and endorsements relating to virtually every other state. Petition for Writ of Certiorari at 14 n.6. Yet, the policy coverage and endorsements clearly evidence Playtex's intent to insure against liabilities arising out of its deliberate contacts with Kansas. That Playtex believed it might incur liabilities as a result of its activities in other states does not operate to deprive Kansas of jurisdiction over this matter.

state where a covered claim arose. In this case, "ultimate net loss" was incurred, payable and paid in Kansas.¹³ Thus, Playtex clearly enjoys the benefits of the laws of Kansas, including laws relating to insurance. Accordingly, it was eminently reasonable and foreseeable that a dispute involving the application of an insurance contract relating to Playtex's Kansas products would be located in Kansas. In this light, Playtex's assertion that it "could not have reasonably expected that it could be haled before a Kansas court in a suit seeking an interpretation of the contracts," Petition for Writ of Certiorari at 15, is simply disingenuous.¹⁴

The well-reasoned decision of the Kansas Supreme Court also does not inject unpredictability where none before existed. Rather, it recognized Playtex's purposeful, substantial and continuous contacts with Kansas and found that those contacts gave rise to the punitive award which is the very subject matter of this litigation. If, as Playtex argues, it may be amenable to suit in every jurisdiction in which its products may be found, it

¹³ Ultimate net loss is defined as "[t]he total sum which the insured or any company as his insurer . . . or both pays as a consequence of an "occurrence" . . . Kansas Supreme Court Record at Vol. II p.179 (emphasis added).

¹⁴ In *Rush*, 444 U.S. 320 (1980), the Court stated that, unless "related to the operative facts" of the action, the contractual arrangements between the defendant and its insurer are not relevant to the substance of the underlying litigation and accordingly do not affect the court's jurisdiction "unless they demonstrate ties between the defendant and the forum." *Id.* at 329 (emphasis added). Thus, petitioner's citation of *Rush* is erroneous in at least two respects. First, unlike *Rush*, the operative facts of the underlying action in this case are not only related, but also serve as the basis for this action. Second, Playtex purchased the policy at issue for the purpose of covering liabilities arising out of its contacts with Kansas. Accordingly, the policy, in addition to being directly connected to the underlying action, demonstrates Playtex's purposeful ties with the State of Kansas.

is only because Playtex has purposefully and continuously directed its products to those states and because the question of whether it will be liable for the harm its products cause forms the basis of the suits. *Cf. Asahi*, 480 U.S. at 109-112 (O'Connor, J., joined by Rehnquist, C.J., Powell, J.J., and Scalia, J.J.); *World-Wide Volkswagen*, 444 U.S. at 297-98. Because Playtex's marketing and sales of its products in Kansas form the basis of this action, there is no unfairness in allowing the State of Kansas to assume jurisdiction.

Finally, the Kansas decision is fully consistent with the Due Process protection against states reaching out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system. As the Kansas Supreme Court noted in its decision, "[w]here an award of punitive damages is made in Kansas, pursuant to the laws of Kansas, Kansas public policy should control the determination of who will pay those damages." *St. Paul Surplus Lines*, 777 P.2d at 1266. This litigation is not, as Playtex contends, a dispute primarily about indemnification. The State of Kansas is not, as was the State of California in *Asahi*, a bystander to a dispute between private litigants over indemnity. The State of Kansas has a greater interest in this litigation than providing for its citizen's collection of a judgment. The State of Kansas has a direct interest in this case in

requiring Playtex, as the culpable party, to pay any punitive damage award.¹⁵

More importantly, the facts that Playtex's product caused a death in Kansas, that a Kansas Court entered a judgment awarding punitive damages to a Kansas citizen, and that the Kansas award is the basis of this action, all serve to implicate the interest of Kansas and to focus the dispute on Kansas. In this light, Playtex's contention that its contacts with the State of Delaware and Delaware's alleged "closer connection" to the dispute by reason of the fact that Playtex was to receive its indemnity payment in Delaware must fail.¹⁶ Not only is the contention factually inaccurate, *see supra* at 18-19, but the Due Process

¹⁵ There is no merit to petitioner's contention that the interest of the State of Kansas is remote because "[t]he amount of the punitive damages award, the stigma associated with such an award, and the fact that the award is likely to be reflected in increased insurance costs or the inability to obtain insurance at all, guarantees a significant deterrent effect." Petition for Writ of Certiorari at 16. It is not for petitioners to determine whether mere entry of the award, without its enforcement against the culpable party, will provide a sufficient deterrent to it and to other culpable parties. Rather, that judgment, laden as it is with public policy, is for the State of Kansas to make.

¹⁶ Interestingly, Playtex's allegation of forum shopping might be most appropriately leveled at itself. Rather than accepting the law of the state in which its products cause injury for purposes of determining whether a punitive award may be indemnified (a fact that is puzzling in light of Playtex's assertion that the majority rule allows indemnification), Playtex contends that the law of Delaware should apply. Not surprisingly, the law of Delaware allows a culpable party to receive indemnity for its reckless and wanton acts. See *Whalen v. On-Deck, Inc.*, 514 A.2d 1072 (Del. 1986). Indeed, if there was any forum shopping, it was clearly evidenced by Playtex's claim in the trial court that Delaware was its principal place of business notwithstanding the fact that in other litigation it had claimed as its principal place of business Connecticut, where its corporate headquarters are located. Trial Court Op. ¶ 16, *reprinted in* Petition for Writ of Certiorari at 33a.

Clause does not limit jurisdiction only to the state with the most or strongest contacts. Accordingly, the strong public policy interest of Kansas in the instant dispute weighs in favor of finding that Kansas properly exercised *in personam* jurisdiction.

In sum, Playtex's substantial contacts with the State of Kansas and the nature of those contacts indicate that Playtex was not unduly prejudiced by litigating its claim in the Kansas Courts. Rather, Playtex's conduct in purposefully directing its activities at Kansas and the benefit it derived from the general laws of Kansas as well as the laws relating to insurance establish the eminent fairness of requiring Playtex to appear and defend in Kansas. In addition, the special interest of Kansas in this dispute and the public policy it seeks to promote also allow it to exercise jurisdiction consistent with Due Process limitations.

II. THE KANSAS COURT'S DECISION TO APPLY KANSAS LAW IS FULLY CONSISTENT WITH THIS COURT'S GUIDANCE.

Playtex understandably wishes to disregard the effects its products had on the residents of Kansas. The fact remains, however, that one of the products Playtex marketed and sold in Kansas caused the death of a Kansas resident. As a result, a Kansas jury applying Kansas law awarded substantial punitive damages against Playtex. Given the award, the State of Kansas has an overwhelming interest in enforcing its public policy by ensuring that the culpable party actually pays the punitive award. Therefore, the decision of the Kansas Court applying Kansas law is proper and entirely consistent with this Court's Due Process requirements.

Playtex erroneously relies on *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), in support of its contention that application of Kansas law violates Due Process protections. In *Shutts*, the Court determined that Kansas law would not properly apply to resolve petroleum lease royalty disputes with respect to out-of-state leaseholders and out-of-state leases. Although Playtex correctly notes that the present case is distinguishable from *Shutts*, Petition for Writ of Certiorari at 26, it errs in arguing that the standards set forth in *Shutts* are inconsistent with the decision of the Kansas Supreme Court. Rather, application of Kansas law is fully consistent with *Shutts* and with this Court's decisions outlining Due Process limitations on choice-of-law decisions.

This Court began its analysis in *Shutts* by determining whether the law applied "conflicts in any material way with any other law which could apply." 472 U.S. at 816. After finding a conflict, this Court next determined whether the state whose substantive law had been applied had a "significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." 472 U.S. at 818, (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981)).

Concerning the threshold inquiry, the assertion that Delaware allows a culpable party to be indemnified for punitive damages awarded against it, Petition for Writ of Certiorari at 24, is insufficient to demonstrate a conflict between Kansas law and any other law which could apply. Modern choice-of-law analysis requires the application of the law of that state which has the most significant interest in the outcome of the dispute. See e.g., *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 6 (1969). The record is clear that relevant policies were negotiated in

Illinois, California and New York. Trial Court Op. ¶¶ 26-30, reprinted in Petition for Writ of Certiorari at 34a-35a. They were issued in Minnesota, California, New York and Illinois. *Id.* All policies were delivered to Esmark in Illinois. *Id.*

Thus, although Kansas, as the jurisdiction in which the death occurred and the resulting punitive award was entered, has the most significant interest and contacts with this dispute, Illinois, Minnesota, California and New York are other states which also conceivably have some relation or contacts to this dispute. Yet, the law of Illinois, Minnesota, California and New York, like the law of Kansas, precludes the insurance of punitive damages. *Ford Motor Co. v. Home Ins. Co.*, 172 Cal. Rptr. 59, 116 Cal. App. 3d 374 (Cal. App. 1981); *Beaver v. Country Mut. Ins. Co.*, 95 Ill. App. 3d 1122, 51 Ill. Dec. 500, 420 N.E.2d 1058 (Ill. App. 1981); *Public Services Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 442 N.Y.S.2d 422, 425 N.E.2d 810 (1981); and *Caspersen v. Webber*, 298 Minn. 93, 213 N.W.2d 327 (1973). Thus, Playtex simply cannot make the requisite threshold showing that Kansas law conflicts with any other law which could apply.

In response, Playtex asserts that Delaware law, which apparently allows insurance of culpable conduct, applies to all disputes concerning punitive awards entered against it nationwide. Yet Playtex has never clearly demonstrated that Delaware law could be applied to this dispute. Playtex argued that because it was incorporated in Delaware, the location of the insured risk under the policies was Delaware. In addition, Playtex asserts, without substantiation, that Delaware is the place where payment under the policies was to occur. Petition for Writ of Certiorari at 24. In fact, the evidence in the record is clear that the insurers' payment of the compensatory award under the policies occurred in Kansas and that payment of the punitive award,

had it been due, would also have occurred, pursuant to the terms of the contract, in Kansas as well. *See, supra* at 18-19; *see also* Affidavit of Kristi E. Teigen, Kansas Supreme Court Record Vol. XX at p. 23, *reprinted in*, appendix to this brief at 1a-3a. Although Playtex's strategic plan has been to argue nationwide for the application of Delaware law to all punitive damages disputes, the record in this case demonstrates that Delaware has insufficient contacts and interest in the dispute to even be considered as a state whose law could apply. Accordingly, because all of the states whose laws could apply are uniform in prohibiting a culpable party from receiving payment for punitive damages, the Court need not even explore beyond the threshold conflict inquiry.

Assuming, however, the Court were to move beyond the threshold inquiry, Playtex's "significant contacts" with Kansas creating its substantial interest in enforcing the punitive award entered in Kansas arising out of culpable conduct which occurred in Kansas are such that "choice of its law is neither arbitrary nor fundamentally unfair." *Shutts*, 472 U.S. at 818. This Court's cases require that the state "must have a 'significant contact or significant aggregation of contacts' to the claims asserted" in the litigation. *Id.* at 821. That is, the state must have a connection to the "particular set of facts giving rise to [the] litigation." *Id.* at 818. Disregarding this clear language, Playtex artificially limits its consideration to the insurance policies themselves rather than considering the totality of the actions giving rise to this dispute. Based on that erroneous and artificially limited view, Playtex contends that application of Kansas law is improper "in the absence of a direct contact

between the forum and the transaction at issue (*here, the insurance policies*)." *Petition for Writ of Certiorari at 26* (emphasis added).

Yet, applying the appropriate standard and examining the totality of the particular facts giving rise to this litigation, Kansas has a compelling justification for applying its law to resolve the dispute in question. A product that Playtex deliberately marketed and sold in Kansas caused the death of a Kansas resident, Betty O'Gilvie. Betty O'Gilvie's survivors, who were residents of Kansas, sued Playtex in Kansas and obtained a punitive damage award. It is that punitive damage award and the facts on which it is based that "give rise to this litigation." *Shutts*, 472 U.S. at 818. Thus, Kansas has a clear connection to the facts giving rise to this litigation.

Contending that Delaware law, rather than Kansas law, should apply, Playtex asserts that "it is highly relevant that in all of the cases in which the forum's decision to apply its law was upheld, the policy beneficiary was a resident of the forum or at least was injured there." *Petition for Writ of Certiorari at 25* (emphasis added). Respondents agree that the location of the injury is relevant, yet given the nature of the policy and the insured risk, the loss insured against clearly occurred in Kansas. The policies here at issue are multiple risk policies covering every state. Interpreting such policies, courts treat the policies as if they contained a separate policy covering each state and have consistently applied the law of the forum where the injury occurred in interpreting them. *See Raymond v. Monsanto Co.*, 329 F. Supp. 247, 249 (D. N.H. 1971) (determining an insurer's right to withdraw representation based upon law of forum where injury occurred). *See also, Norfolk & Western Ry. Co. v. Hartford Accident & Indem. Co.*, 420 F. Supp. 92, 94 (N.D. Ind.

1976) ("[T]o an extent, the policy incorporates the law of every state in which the insured's activities may take place.").¹⁷ Thus, the relevant loss (entry of the punitive award) occurred in Kansas.¹⁸

In addition, Kansas has a substantial public policy interest in this dispute. The law of Kansas precludes the insurability of punitive damages. *Guarantee Abstract & Title Co. v. Interstate Fire & Casualty Co.*, 228 Kan. 532, 618 P.2d 1195 (1980); *Smith v. Merchants Mut. Bonding Co.*, 211 Kan. 397, 507 P.2d 189 (1973). The clear public policy underlying the law is that the

¹⁷ See also, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §193 Comment f (1969). The comment specifically addresses the "location of the risk" issue with respect to multi-risk insurance policies:

Multiple risk policies. A special problem is presented by multiple risk policies which insure against risks located in several states. A single policy may, for example, insure dwelling houses located in states X, Y and Z. These states may require that any fire insurance policy on buildings situated within their territory shall be in a special statutory form. If so, the single policy will usually incorporate the special statutory forms of the several states involved. Presumably, the courts would be inclined to treat such a case, at least with respect to most issues, as if it involved three policies, each insuring an individual risk.

¹⁸ With respect to Playtex's residence, the Court should note that of the cases Playtex cites only *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954), involved a multi-state, multi-risk comprehensive general liability policy such as the policies in the present case. *Watson* involved a suit by the injured party against the insurer under Louisiana's direct action statute. The Court should note that the *Watson* Court upheld the application of the law of the place where the injury arose even though the injured person was a third party and not party to the original insurance contract. The insurance contract at issue was negotiated in Massachusetts and delivered in Illinois and Massachusetts and had a clause expressly prohibiting direct action prior to a final determination of the underlying liability. *Id.* at 67-68. Nevertheless, because the underlying third party injury occurred in Louisiana, Louisiana law was applied based on the state's "legitimate interest in safeguarding the rights of persons injured there." *Id.* at 73.

deterrant effect of a punitive award is blunted and wrongful behavior is encouraged by allowing the culpable party to contract for payment of a punitive award by a guiltless guarantor. Yet, if Kansas is precluded from applying its public policy to this dispute, non-resident Kansas tortfeasors will be able to circumvent this policy merely by contracting with an out-of-state insurer.

Given the substantial connection between the facts giving rise to this action and the State of Kansas, application of Kansas public policy through its law is fully justified and consistent with Due Process requirements. This Court long ago indicated that a state may permissibly apply its public policy to resolve a dispute. In *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), this Court stated:

Doubtless, a state may prohibit the enjoyment by persons within its borders of rights acquired elsewhere which violate its laws or public policy; and, under some circumstances, it may refuse to aid in the enforcement of such rights . . . It may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.

281 U.S. at 410. Applying the standard set forth in *Dick*, Kansas may pursue its public policy unless the rights it is seeking to enforce have "no relation to anything done or to be done within" Kansas. Given the direct connection between the facts giving rise to this litigation and the State of Kansas, there can be no doubt that Kansas properly applied its public policy in this action.

Finally, Due Process protections require that a state's "choice of law is neither arbitrary nor fundamentally unfair." *Shutts*,

472 U.S. at 818, 819. In *Shutts*, this Court further stated that “[w]hen considering fairness in this context, an important element is the expectation of the parties.” 472 U.S. at 822. Concerning its expectations, Playtex disingenuously asserts that it “had absolutely no reason to anticipate that Kansas law would apply in the event of a coverage dispute.” Petitioner’s brief at 26. The record, however, clearly indicates that Playtex expected Kansas law would apply in the event of a Kansas punitive damages award. Evidence of Playtex’s expectation is found in their Form S-1 Registration Statement filed with the SEC. Kansas Supreme Court Record Vol. III at p. 19. In that form, Playtex, in discussing its insurance coverage, stated that “certain state laws place limitations on coverage for punitive damages.” *Id.* The statement clearly evidences Playtex’s understanding that insurability of punitive awards would be determined according to the law of the state in which the award was entered.

In addition, Charles Kahsen, Playtex’s agent who drafted the policy language relevant to punitive damages coverage, has testified to his understanding and intent that the question of insurability of punitive damages would be governed by the choice-of-law principles of the state where any given action was pending. Kansas Supreme Court Record, Vol. XI, pp. 38-39, reprinted in Appendix to this Brief at 4a-5a. Thus, it is clear that Playtex recognized coverage for punitive damages would be determined on a state-by-state basis.

In sum, the decision of the Kansas Supreme Court concerning the choice of law decision is fully consistent with the clear framework set forth by this Court to determine whether a state’s choice of law comports with Due Process guarantees. The State of Kansas has a direct connection with the totality of the

facts giving rise to this action. Moreover, Kansas has a clear and substantial public policy interest in this dispute, and Playtex expected that policy would be given effect should it seek payment for a punitive award entered in Kansas. Therefore, the decision of the Kansas Supreme Court is correct and does not warrant this Court's review.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

— IN THE

Eighteenth Judicial District

DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

ST. PAUL SURPLUS LINES
INSURANCE COMPANY, NATIONAL
UNION FIRE INSURANCE COMPANY,
INTERNATIONAL INSURANCE
COMPANY, GRANITE STATE
INSURANCE COMPANY and AIU
INSURANCE COMPANY,

File No. 88-C-463

Plaintiffs,

vs.—

INTERNATIONAL PLAYTEX, INC. and
PLAYTEX FAMILY PRODUCTS, INC.,

Defendants.

**AFFIDAVIT OF
KRISTI E. TEIGEN**

STATE OF MINNESOTA }
COUNTY OF RAMSEY } ss.

KRISTI E. TEIGEN, being duly sworn, deposes and states as follows:

1. I am a Claims Manager employed by St. Paul Surplus Lines, one of the parties in this action. I am responsible for handling and monitoring the claims asserted against International Playtex, Inc. (IPI) arising out of Toxic Shock syndrome (TSS).
2. I have attended claims meetings with representatives of Crawford & Company, the independent claims adjusting service retained by IPI to handle claims for TSS. These meetings are attended by representatives of other insurers and representatives of IPI. Joel Coleman, General Counsel for IPI, attends these meetings, as a representative of IPI.
3. Joel Coleman, to my knowledge, the only employee of IPI who has communicated with the insurers regarding claims of TSS, including matters involving punitive damages. In the Fall of 1987 it was Mr. Coleman who informed St. Paul Surplus Lines and National Union that IPI would look to St. Paul Surplus Lines and National Union to pay the \$10,000,000 punitive damage award, interest, and cost of appeal of the *O'Gilvie* action.
4. The underlying excess umbrella carrier, Mission National Insurance Company, denied coverage for the punitive damage award in the *O'Gilvie* action. It is my understanding that Mr. Coleman as a representative of IPI, communicated with representatives of Mission regarding the reasons for the denial. It is also my understanding that Mr. Coleman has had communications with other carriers relating to the insurability of another punitive award in a prior action against IPI.

5. Mr. Coleman signed a "letter of intent" that was to be executed by IPI's liability carrier, relating to the handling of TSS claims. A true and correct copy of this letter is attached to this Affidavit.

6. It is my understanding that Mr. Coleman is the liaison between IPI and the insurers regarding coverage issues relating to TSS.

7. If St. Paul Surplus Lines is found liable for the payment of the punitive damage award in the *O'Gilvie* action it would make a direct payment of this amount, plus accrued interest, to the attorney who represented the estate of Ms. *O'Gilvie* in that action. That payment would be made in Wichita, Kansas.

8. Attached to this Affidavit are true and correct copies of checks that have been paid directly by St. Paul Surplus Lines to counsel in the Toxic Shock Syndrome claim asserted against International Playtex, Inc.

FURTHER AFFIANT SAYETH NOT.

/s/

KRISTI E. TEIGEN

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

ST. PAUL SURPLUS LINES
INSURANCE COMPANY, NATIONAL
UNION FIRE INSURANCE COMPANY,
INTERNATIONAL INSURANCE
COMPANY, GRANITE STATE
INSURANCE COMPANY and AIU
INSURANCE COMPANY,

File No. 88-C-463

Plaintiffs,

-against-

INTERNATIONAL PLAYTEX, INC. and
PLAYTEX FAMILY PRODUCTS, INC.,

Defendants.

Deposition of CHARLES W. KAHSEN, held at the offices of Spengler, Carlson, Gubar, Brodsky & Frischling, Esqs., 280 Park Avenue, New York, New York, on the 12th day of May, 1988, at 3:05 o'clock p.m., pursuant to Notice, before Andrew L. Pustay, a Notary Public of the State of New York.

APPEARANCES:

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BY: BETHANY K. CULP, ESQ.

-and-

LAURA A. GRAHAM, ESQ.,

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BY: WALTER L. PEPPERMAN, II, ESQ.,

Of Counsel

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, ESQS.

Attorneys for Witness Fred E. James & Co.

420 Lexington Avenue

New York, New York 10170

BY: PHILIP J. WALSH, ESQ.,

Of Counsel

....

Q. Mr. Kahsen, what was your intent when you included that language "to the maximum extent permitted by law"?

A. That if and when a contract action was brought with respect to the insurability of a punitive award, that the state where the action was brought would apply its law, including its conflicts law, in making a determination.

Plaintiff's Response to Defendant's First Set of Interrogatories, in *Playtex Family Products Co. v. St. Paul Surplus Lines Ins. Co.*, Superior Court for the State of Delaware, New Castle County, C.A. No. 88-FE-166-1-CV.

INTERROGATORY NO. 1: Identify the locations where Playtex Super Deodorant Tampons were manufactured during the years 1980-83.

RESPONSE: Since 1968, Playtex has maintained a manufacturing and distribution center for tampons in Dover, Delaware; Playtex' predecessor began doing business in Delaware in 1932. During the years 1980-83, the Delaware facility produced approximately 85% of all Playtex tampons distributed nationally.

During the years 1980-83, Playtex' Dover, Delaware facility was the operational headquarters for the manufacturing, packaging, quality control, and product distribution processes. Personnel located at the Camarillo, California facility reported directly to personnel in Dover, Delaware.

During the 1980-83 period, Playtex maintained a manufacturing and distribution facility in Camarillo, California for the production and distribution of Playtex tampons in certain Western states. In June, 1983, the tampon manufacturing operation at this facility was discontinued. During the years in question, the California facility distributed approximately 15% of the overall volume of Playtex tampons sold domestically, specifically in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Texas (El Paso County only), Utah, Washington, Wyoming, Alaska and Hawaii.

Plaintiff's complex in Dover, Delaware consists of more than 81 acres. Playtex also leases 184,680 square feet of office space. The Playtex complex at Dover is the manufacturing, packaging and distributing hub of the company for all of its domestic products, including tampons. The Dover facilities of Playtex serve as the operational headquarters for Playtex' administrative groups and is the location for corporate-wide Treasury, Finance, Tax, Management Information Services and Risk and Insurance functions. All sales of tampons are communicated to Dover by the field-sales force and those orders are processed by Playtex at Dover. These orders are filled by a shipment of tampons from Dover, Delaware. The Camarillo, California facility now serves solely as a distribution facility and all shipments from that California facility are made in response to orders which are received and processed at Dover. Since tampons are regulated by the Federal Food and Drug Administration ("FDA"), inspectors from the FDA inspect Playtex' tampon facilities at Dover. The accounts payable and accounts receivable functions are handled exclusively at Dover, as are the billing and posting of invoices and the posting of receipts of cash for all domestic products.